FARIS FARMS v. LASSEN FARMS, d/b/a MIDSTATE CORPORATION.
PACA Docket No. R-99-0146.
Decision and Order filed June 28, 2000.

Jurisdiction - Covered transactions.
Jurisdiction - Interstate commerce.
Statute of Frauds - Applicability to reparation proceedings.
Evidence - Weight accorded to sworn statements.

Respondent contracted in a letter to Complainant to purchase and harvest tomatoes grown on two 75 acre fields during weeks ending August 30, and September 6, 1997. The contract contemplated that Respondent would contract with tomato processors to take tomatoes from the contracted acreage. With the consent of Complainant, Respondent began harvest of the first field early, on August 21, after a rain on August 19. After six days, when over 20 acres remained to be harvested from the first field, Respondent, citing the presence of excessive mold in the tomatoes, ceased to harvest the tomatoes under the contract, and offered to continue harvesting only if paid an hourly rate. Respondent also offered to allocate tomatoes which Complainant might harvest to its contracts with processors. Complainant continued the harvest with its own equipment but was not allocated sufficient loads to accommodate all the tomatoes which it could have harvested from the second field. Twenty acres were left unharvested in the first field due to excessive mold. It was found that Respondent breached the contract by ceasing to harvest Complainant's tomatoes under the contract, that Respondent did not harvest the first field in an expeditious manner, and that Respondent failed to allocate Complainant sufficient loads for processing from Complainant's harvest operation. Damages were awarded for these and other lesser breaches by Respondent.

It was also held that contracts for the rendering of a service such as harvesting are covered by the Act if they involved the sale of a perishable commodity, and that where tomatoes were sold for processing within the state where grown, and Complainant offered testmony which was unrebutted that the processed tomatoes were sold in interstate commerce, the Secretary had jurisdiction over the transactions. In addition it was held that the statute of frauds embodied in the Uniform Commercial Code is procedural and not substantive, and that, therefore, oral modifications of the written contract were a matter for proof in a reparation proceeding. In regard to relevant evidence offered by the parties under the documentary procedure it was stated that statements of fact sworn to by a party involved in relevant transactions could be accorded less weight when the statements were a part of legal argument obviously constructed by an attorney who was the first person to sign the statement.

George S. Whitten, Presiding Officer.
Steve Lewis, Sacramento, California, for Complainant.
Patrick Markham, Sacramento, California, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant sought an award of reparation in the amount of $52,532.00, or "such amount of damages as it may be entitled to receive according to the facts established," in connection with transactions in interstate commerce involving tomatoes. Later, in its opening statement, Complainant increased its damages claim to $73,551.00.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file a proper answering statement. Respondent filed a brief.

Prior to the filing of its brief Respondent moved to dismiss the complaint because the complaint alleges a services contract for the harvesting of produce over which the Secretary has no jurisdiction. The Presiding Officer, however, refused to dismiss, pointing out that the complaint alleges that: "complainant, by written contract dated March 7, 1997 (and modified), sold to the respondent all tomatoes to be grown by complainant on 153 acres, ..." The Presiding Officer further stated:

> The sale of tomatoes is clearly a transaction that is covered by the Act. See John F. Areklet v. Stokely USA, Inc., 55 Agric. Dec. 1387 (1996); and R.B. Todd Prod. Co. v. Frostreat Frozen Foods, 22 Agric. Dec. 917 (1963). The fact that in conjunction with the sale Respondent undertook to perform other duties such as the harvesting of the tomatoes for a fee, does not divest the Secretary of jurisdiction. Compare Frank Kenworthy Co. v. D.L. Piazza Co., 16 Agric. Dec. 844 (1957); Alexis Relias v. Kenworthy, 16 Agric. Dec. 590 (1957) and Sawyer v. Rothstein & Sons, 15 Agric. Dec. 693 (1956). The motion to dismiss is denied.

The actual monetary arrangement of the contract is such as to enhance Respondent's contention that the contract was a service contract having only to do with the harvesting of the tomatoes. However, the form of the contract is not without practical significance and effect. The tomatoes were in fact sold by Complainant to Respondent, and in turn by Respondent to the processors. This involved a transfer of title with concomitant legal and practical results. The responsibilities resulting from this transfer of title were real, not fictional. If all that was intended was a contract for the service of harvesting the tomatoes the contract could have easily been drawn so as to achieve that object alone. We concur in the Presiding Officer's ruling.

Findings of Fact

1. Complainant is a partnership composed of Robert Faris, Sr., Robert Faris, Jr., and James Jobe Faris, doing business as Faris Farms, whose address is Attn: Robert Faris, P. O. Box 8449, Woodland, California 95776.

2. Respondent is a corporation, Lassen Farms, doing business as Midstate Corporation, a Nevada corporation, whose address is 2756 N. Green Valley Parkway, #193, Henderson, Nevada 89014. At the time of the transactions involved herein Respondent was not licensed under the Act, but was operating subject to license.

3. On or about March 7, 1997, Respondent's John Lear, under the letterhead of Lassen Farms, 2756 N. Green Valley Pkwy., #193, Henderson, Nevada 89014, wrote to Complainant's Robert Faris as follows:

> The following letter will act as a crop assignment between Lassen Farms above named address and Faris Farms of Woodland, California. The named principals involved are John M. Lear, owner and operator of Lassen Farms and Robert Faris who acts in the same capacity for Faris Farms.
>
> It is hereby agreed that Faris Farms will grow approximately 153 acres of processing or "cannery tomatoes" for Lassen Farms. The tomatoes will be delivered during week endings 8/30/97 and 9/6/97. Lassen agrees to purchase and deliver all tomatoes grown off designated acreage with Faris Farms. Designated food processors and contract numbers will be given at a later date.
>
> Lassen Farms agrees to harvest said acreage for a fee of $11.00 per paid ton of tomatoes with all remaining proceeds being assigned to Faris Farms or designated bank entity. Time is of the essence regarding food processor payments. Lassen Farms agrees to pay Faris Farms or designated bank on same day it receives named funds minus the $11.00 per ton harvest cost.

4. Complainant made staggered plantings of two approximately 75 acre fields. During the summer of 1997, Respondent informed Complainant that the harvesting was estimated to be accomplished in two three day shifts, or a total of six days for the entire ranch.

5. On the evening of August 19, 1997, it rained in the growing area of Complainant's two fields. Respondent began the harvesting of Complainant's crop from the first field on August 21, 1997. On August 26, 1997, Respondent wrote the following letter to Complainant:

> As is customary in the business I must change to an hourly rate of $350.00 per hour due to the mold crisis. I will begin that rate on day shift Wednesday August 27th. Tonight August 26th half of my picked loads met

state requirements of 8% mold tolerance, however starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance. As we discussed I will provide you starting August 27th with loads to pick on your own rather than pay me the $350.00 hourly rate. Starting day shift August 27th I will work for you on an hourly basis and at your instruction. I will not take responsibility as of August 27th for any processor mold rejects however I will work with you in any way I can to salvage the field, by contracting other processors, and as stated previously giving you loads on a daily basis to pick with your own machine.

6. On August 27, 1997, Respondent ceased harvesting Complainant's tomatoes after harvesting nine loads. The total number of loads harvested by Respondent during the time between beginning the harvest on August 21, and ending harvest on August 27, was ninety-seven loads, and all were harvested from the first field. The number of loads harvested by Respondent on a daily basis were as follows:

Date	Loads
21st	12
22nd	14
23rd	14
24th	5
25th	25
26th	18
27th	9

7. Complainant commenced harvesting the remainder of the first field on August 27, 1997, but did not harvest the last 20 acres from the first field because of excessive mold in the tomatoes. Complainant harvested tomatoes from the first field through the 27th, and continued harvesting the tomatoes from the remaining field through September 11, 1997. Respondent and Complainant together harvested a total of 180 loads from Complainant's two fields. The daily number of loads harvested by Complainant were as follows:

Date	Loads
27th	6 (from first field)
28th	4
29th	4
30th	5
31st	5
1st	7
2nd	6
3rd	7

Date	Loads
4th	7
5th	6
6th	5
7th	7

8th	4	11th	2
9th	4		
10th	4		

8. All of the 180 loads were weighed and inspected before being delivered to the processor. Out of the 180 harvested loads a total of four loads were rejected and not processed. Two of these loads, rejected and not processed, were rejected by the California Processing Tomato Advisory Board for excessive mold. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/25	11:36	137940-01	52,110	10.5
8/26	9:03	130034-01	48,510	11.5

The remaining two loads, rejected and not processed, were termed "PROCESSOR REJECT" on the inspection certificates. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/31	14:19	138641-01	49,570	7.5
9/09	12:51	140059-01	51,770	6.5

Four additional loads were classified as "PROCESSOR REJECT" on the inspection certificates, but were in fact accepted, processed and paid for by the processor. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/27	14:49	138151-01	53,320	5.5
8/27	08:40	138119-01	46,070	5.5
9/02	12:50	138920-01	50,270	5.5
9/09	11:11	140044-01	50,130	5.5

9. Twenty-one additional loads were noted on the inspection certificates to have in excess of 5 percent mold, but were not noted as being rejected, and were in fact processed and paid for by the processor. Eleven of these loads were inspected on August 25, 1997. Of these August 25, loads one had 5.5 percent mold, seven had 6 or 6.5 percent mold, two had 7.5 percent mold, and one had 8 percent mold. Three of the twenty-one were inspected on August 26, 1997. Two of these had 7.5 percent mold, and one had 8 percent mold. Seven of the twenty-one were inspected on August 27, 1997. Four of these had 6 or 6.5 percent mold, two had 7.5 percent mold, and one had 8 percent mold.

10. The average sale price for the tomatoes harvested from Complainant's acreage was $52.65 per ton. On September 30, 1997, Respondent issued a final

accounting to Complainant which stated as follows:

		Harvest Deduction Itemized
Lassen Harvest	1671.26 Pay Tons at $11.00	18,383.86
Lassen Harvest	726.29 Pay Tons at $13.00	9,441.77
Faris Harvest	1834.93 Pay Tons	
	4232.48 Total Pay Tons	

Previous Payouts

			176	
W/E	8/23	36,000	Loads Gross Dollars	222,820.03
W/E	8/30	73,000	Total Deductions	31,496.48
W/E	9/6	50,000	Previous Payments	159,200.00
		159,200	Balance Due	$ 32,123.55

Deductions -		
.80% of Lassen 3	Curly Top	584.90
.80% of " "	Weigh Station Fees	60.00
" " " "	Inspect. Fees	686.02
H Rejects °126.00 (Reject Hauling)	Trucking Charges	505.00
Lassen Harvest		27825.63
Lassen Management $1.00 per pay ton		1834.93
Total Deduction		31,496.49

11. The informal complaint was filed on May 13, 1998, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant alleges breach of contract by Respondent, and seeks, in the formal complaint, to recover damages in the amount of $52,532.00. In its opening statement Complainant increased the damages request to $73,551.00.

Complainant asserts that the original contract, represented by the letter of March 7, 1997, quoted in Finding of Fact 3, was modified orally to provide for the harvesting and delivery of the first planting to commence on August 17, 1997, instead of the week ending August 30, 1997. Respondent's commencement of harvest on August 21, 1997, instead of on August 17, 1997, is one of the breaches of contract alleged by Complainant. Respondent denied in its answer that there was a modification of the contract. Complainant also alleges that Respondent did not harvest the first field in an expeditious manner, and that if it had the twenty acres of tomatoes that were left in the field because of mold could have been harvested. Respondent's refusal to continue the harvest after August 27, 1997, for the agreed $11.00 per paid ton, and the failure to harvest the second field under those terms is alleged as another breach of contract. Complainant also asserts that Respondent did not allow the delivery from the second field of all the tomatoes that Complainant could have harvested on its own.

Respondent, in its answer, denied generally the allegations of the complaint

without any elaboration except to assert that the terms of the contract alleged by Complainant were incorrect to the extent that they differed from the written agreement. Also, Respondent set up six affirmative defenses. The first of these was that the Secretary lacks jurisdiction because the subject matter of the complaint concerns a service contract. This was dealt with in the preliminary statement.

Respondent's second defense alleges that the Secretary lacks jurisdiction because Complainant was not doing business in interstate commerce. However, the Act specifically includes within the definition of interstate commerce "all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing."[1] Complainant's partner, Robert Faris, alleged in the sworn complaint that he was informed and believed that the processed tomatoes were delivered and sold in interstate commerce. Respondent offered no rebuttal evidence that specifically addressed this testimony. We conclude that the subject matter of the complaint was in interstate commerce, and that the Secretary has jurisdiction over this matter for that reason.

The third affirmative defense asserts that "Complainant's alleged loss or damages, if any, was increased by Complainant's failure to use reasonable diligence to mitigate the same." The fourth defense alleges, in essence, that Complainant failed and refused to have sufficient quality tomatoes available pursuant to the harvest schedule. These allegations will be dealt with subsequently.

Respondent's fifth and sixth affirmative defenses relate to the alleged modification of the contract. Respondent states that the allegation of a modification is a misrepresentation directed toward this Department, and is therefore fraudulent, and also asserts that since it is alleged to be an oral modification of a written contract it is void and unenforceable under the statute of frauds.

It is not necessary for us to discuss whether the alleged modification of the written contract falls under one of the exceptions to the statute of frauds because the statute of frauds as embodied in the Uniform Commercial Code, sections 2-201 and 2-209(3) is not applicable to reparation proceedings under the Perishable Agricultural Commodities Act. In *Hegel Branch v. Mission Shippers*, 35 Agric. Dec. 726 (1976), we stated our policy relative to the applicability of State statutes of frauds to reparation proceedings:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg v. A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A. D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule

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[1] 7 U.S.C. § 499a(b)(8).

> of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of substantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg*, supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of Appeals, recognizing that Pennsylvania law was applicable, determined that since the statute of frauds of Pennsylvania was procedural rather than substantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statute of any state", and that where the statute of frauds of a particular state only precluded *enforcement* of an oral contract *as a remedy*, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary or a subsequent appeal therefrom.

In *Donald Woods v. Conogra Inc., and Ctc North America Inc., d/b/a Agrafresh of California*, 50 Agric. Dec. 1018 (1991), where the California statute of frauds (drawn from UCC § 2-201) was in issue, we found that the statute relates to the enforceability of an existent contract, and that *Rothenberg* applied. We stated:

> We feel that the substantive - procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary. . . . we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute.

The question whether there was in fact an oral modification of the contract calling for the harvest to begin on August 17, 1997, is a matter of proof. While the UCC provides that no consideration is necessary for a modification of a contract to be binding, this does not mean that a unilateral modification can take place. There must be at least tacit assent by both parties. The evidence for the existence of a modification of the contract to call for harvest to begin on August 17, 1997, is the statement in the formal complaint, sworn to by Robert Faris, that such a modification of the original contract was made. There is the additional fact that the opening statement, also sworn to by Mr. Faris, states that the contract was modified. However, in the latter statement, instead of saying that the modification called for harvest to commence on August 17, it is stated that “respondent had modified the parties’ contract agreeing to commence the harvest of the first planting a week

early." This would mean only that the tomatoes would be delivered during the week ending 8/23/97 instead of 8/30/97, and does not get us with any certainty to a commitment to the commencement of harvest on 8/17/97. Complainant later states in the opening statement that "complainant terminated irrigation and prepared for harvest to commence the week on or about August 17, 1997, which is the week ending August 23, 1997." If anything, these statements in the Opening Statement weaken the assertion in the Complaint, and cause us to wonder if August 17, was a date certain on which harvest was to commence, or merely, being the first day of the preceding week, inferentially the first day on which harvest might commence. Respondent offered nothing by way of rebuttal evidence to the opening statement, and the only rebuttal evidence to the statement in the complaint are the general denials in the answer quoted earlier.

The problem with the sworn statements contained in the Opening Statement, and in the Answer, is that both these documents are primarily pleadings or argument drafted by the parties' respective attorneys. It is difficult, no doubt, for some to conceive of anyone preferring the simple and clear statement of a lawyer's client to the lawyer's own beautiful, and eloquently reasoned prose. However, in most cases the facts established by the evidence, rather than legal argument, are the most important elements in arriving at a decision. The trier of the facts in a reparation shortened procedure case is dependant upon what is in the pleadings if they are sworn to, is in evidence in the Report of Investigation, and, often most importantly, upon the verified statements of witnesses. When assaying the credibility of evidentiary statements offered in the proceeding something analogous to what goes on in the mind of a jury or judge listening to oral testimony usually takes place. Subtleties exist in written statements that, in the absence of clearer indicators, must be taken into account. Thus, when an evidentiary statement is apparently written by an attorney, when that attorney's signature is the first signature appended to the statement, and when it contains closely reasoned legal arguments, one naturally thinks of the statement as belonging to, and proceeding from, the attorney. The fact that it also contains pertinent statements of fact, and has attached a verification and signature of a witness, certainly makes it a verified statement under the Rules of Practice. But is such a statement as credible as a simple and direct statement of fact from the witness? The situation is somewhat analogous to that of a witness who, on direct, is closely coached by his or her attorney, versus one who is allowed to tell his or her own story without undue assistance from counsel.

We have a very general assertion of a modification. This general assertion is later weakened by the Opening Statement. The general assertion is confronted by a very general denial.[2] Under the circumstances we think the generality of the

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[2]The denial does go beyond the generality of the denial contained in paragraph 2 of the answer, to wit: "Respondent denies generally and specifically Paragraphs 4, 6, 7, 8, 9, and 10 of the Verified Complaint." Respondent asserts in the fifth affirmative defense that "the allegation that there was a

denial is the more excusable. We conclude that Complainant has failed to prove by a preponderance of the evidence that the contract was modified to call for harvest to commence on August 17, 1997.

Harvest did in fact begin on August 21, 1997. Since we surely do not go far astray in assuming that Complainant did not try to prevent this early harvest date, the contract was certainly modified to that extent.[3] It is also clear that Respondent refused to continue the harvest under the terms originally agreed to, and ceased to harvest Complainant's crops on August 27, 1997. The question that confronts us now is whether Respondent's refusal to continue the harvest under the original terms was a breach.

At first blush Respondent's termination of the harvest would certainly appear to be a breach. However, Respondent's John Lear, in the skeleton statement that constitutes Respondent's answer, asserts that Complainant "failed and refused to have sufficient quality tomatoes available pursuant to the harvest schedule . . . ." Taking this assertion along with Lear's letter of August 26th, we infer the reference to be to the allegation of excessive mold in the tomatoes. There was no contract provision in regard to mold levels, or as to what effect, if any, such levels would have upon the duty to harvest. However, there is no necessity that there have been such a provision. Contracts are always governed by the rule of reason, and we have no problem in making the assumption that the contract contemplated only the harvest of tomatoes that were suitable for processing. Indeed, any other contemplation would have to be spelled out in very explicit terms to be given effect. There certainly came a point at which the first field could no longer be harvested because of mold, because Complainant tells us that 20 acres of the first field was left unharvested because of mold.[4] However, Respondent has not shown that the mold problem necessarily prevented its harvest of the entire field, and it is certain that the presence of mold furnished no justification for Respondent's failure to harvest the second field. The inspections of harvested tomatoes show that there was an increase in the mold following the commencement of the first harvest. But the record fails to furnish support for Respondent's termination of the harvest contract. Respondent appears to have been searching for justification for a cessation of its harvesting responsibilities. In the letter of August 26, Respondent stated: "Tonight

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modification to the harvest plan and contract is a misrepresentation . . . and therefore fraudulent." Here, at least, is a little heat to go along with the general denial, though we do not mean to imply that we accede to the accusation of intentional misrepresentation or fraud.

[3]Respondent, in its brief, implies that there was no *terminus a quo* to the contract. However, the initial letter states that the tomatoes "will be delivered during the week endings 8/30/97 and 9/6/97." This indicates that initially a period of no more than a week was contemplated for the harvest of each field.

[4]Respondent agrees with this figure in its brief.

August 26th half of my picked loads met state requirements of 8% mold tolerance, however starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance." In fact, the whole day of August 26th every load but one met the alleged 8% mold tolerance, and the one that did not meet it was inspected on the morning of August 26th, not the night of August 26th. So the statement that "Tonight August 26th half my picked loads met state requirements of 8% mold tolerance . . ." was certainly true. But the implication that half did not was not true. The projection that "starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance," asks for concurrence in an unproved assertion, namely that the processors were enforcing a 5% maximum mold tolerance.[5] In fact the record shows that such a tolerance, if it existed, only excluded two of the 180 loads that were harvested from processing. As noted in the findings of fact only 28 loads of the 180 harvested had in excess of 5 percent mold. Two of these were excluded from processing by the State Board on August 25 and 26, and two were excluded as processor rejects on August 31, and September 9. Four were classified on the inspections as processor rejects on August 27, September 2, and September 9, but were in fact processed and paid for. The remaining 21 loads that exceeded 5 percent mold were not rejected by the State Board, or noted by the inspections as processor rejects, or refused in any way by a processor. We conclude that

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[5]Copies of processor contracts with Respondent were attached to Complainant's Opening Statement. These contracts do reference mold standards. The contract with Toma-Tek, Inc. states in part:

> E. **Inspection/Rejection/Tomatoes "Suitable for Canning"**: Delivery of tomatoes shall not be complete until inspected and passed by the State of California Tomato Inspection Service and inspected and accepted by Company. . . .
> In addition to the above, no tomato shall be deemed Suitable for Canning if:
> . . .
> 2. In excess of ten percent of the weight of the tomato cannot be used for canning purposes, due to the presence of mold or rot.
> . . .
> In addition to the above, any load of tomatoes offered for delivery hereunder may be rejected and turned back to the Seller if:
> . . .
> g. Loads contain in excess of 5% mold. This standard may be reduced as necessary to enable Company to pack an acceptable finished product, but Company will not reduce the reject standards below 5% capriciously.

The 5% standard is thus seen to be quite flexible. A load "may be rejected" for exceeding it, and it can be adjusted downward so as to make it more strict, but not capriciously. The record herein shows that in the vast majority of instances the processors were not enforcing the standard. To be sure one can envision Respondent having offered evidence to show that it was informed by the processors that strict enforcement was contemplated after the 26th. However, Respondent offered no such evidence, and, in contrast, the record shows that the processors accepted loads on the 27th that far exceeded the 5% standard.

Respondent has failed to show any justification for its cessation of harvest, and that it breached the contract by such cessation.

Complainant also alleges that Respondent breached the contract by failing to harvest the field in a timely manner, and that such failure caused the last twenty acres to fail to be harvested before mold became excessive. Complainant sought to show from Respondent's contracts with other growers that Respondent over-booked the total acreage for which it was responsible, and consequently neglected Complainant's field. However, all this evidence proves nothing because it tells us nothing about Respondent's capacity to harvest. Respondent could have booked one hundred times what Complainant shows was booked, and still have met every harvest deadline for all the record reveals. A more fruitful enquiry is whether Respondent performed the harvest with reasonable dispatch in the light of what is known about what was contemplated about how long the harvest should take. The original contract contemplated that the two fields would be harvested in maximum periods of one week. We have found as a matter of fact that Respondent estimated prior to harvest that the entire harvest would be accomplished in two three day periods. Moreover, Respondent should have performed expeditiously in light of what was known about the potential for a mold problem following the rain on the evening of the August 19th. Respondent had the capacity to complete the whole of the first field within a three day period, though there was no firm contract to do so. There was an implicit commitment to complete it within one week. On one of the harvest days Respondent harvested 25 loads from the first field. However, the average harvested was only 14, and on one day the total fell to 5. If Respondent had averaged 20 loads a day, which it clearly was capable of doing, it would have harvested all of the first field within the first week. Respondent was engaged in the harvest of the first field for about six and one half days, but still left in excess of 20 acres unharvested when it ceased harvesting the tomatoes. We conclude that Respondent did not harvest the first field with reasonable dispatch, and that this failure was a breach of the contract between the parties.

Complainant next alleges that Respondent not only failed to harvest the second field without any justification, but also failed to make a sufficient number of loads available to Complainant for delivery to processors.[6] Proof of this allegation, like part of Complainant's proof of damages, depends upon Complainant's estimate of

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[6]This is a reference to the undertaking in Respondent's letter of August 26th whereby, in default of harvesting the field as it contracted to do, Respondent undertook to "provide you starting August 27th with loads to pick on your own rather than pay me the $350.00 hourly rate." This alludes to the fact that Respondent, not Complainant, possessed the contracts with the processors whereby the processors were under obligation to take and process a certain quantity of acceptable loads.

the amount that should be harvested.[7] This estimate is bolstered by Complainant's submission of statistics showing that the average 1997 tomato production in the county where the two fields were situated was 33.61 tons per acre. In addition Complainant's Robert Faris asserts in the opening statement that as to the first field the first four days of harvest produced approximately 1,125 tons of tomatoes from 28 acres, or more than 40 tons per acre. Moreover the parties agree that 55 acres from the first field were harvested, and the processor records show that 103[8] loads were harvested from those 55 acres. At an average of 23.28 tons per paid load (which the record shows to be an accurate figure) the 55 acres produced 2,397.8 tons or 43.59 paid tons per acre. Complainant states in the Opening Statement that the production from the second planting was not as great as from the first, and was probably closer to the average production for Yolo county where the fields were located. Using that figure (33.61 tons per acre) the second field would have yielded approximately 2,520.75 tons. Complainant's data and estimates supplied in the Opening Statement were not rebutted by Respondent, and we accept them as a reasonable bases for the determination that Respondent failed to make sufficient loads available for the full harvest of the second field, and for the assessment of damages. Respondent's defense that Complainant failed to mitigate damages is also answered by this conclusion.

We now arrive at the problem of assessing damages resulting from Respondent's breaches of contract. If Respondent had harvested the first field with reasonable dispatch the 20 acres that remained would have been harvested. Although we have found that the 55 acres harvested from the first field yielded 43.59 tons per acre, Complainant has computed damages on the basis of the lower figure of 40 tons per acre, and we will also use the lower figure. The 20 remaining acres would have yielded a additional 800 paid tons. After deducting the $11.00 per ton harvesting fee these 800 tons would be worth a net amount of $41.65 per ton, or $33,320.00. We conclude that Respondent owes Complainant this amount for the 20 acres not harvested from the first field.

The second field actually yielded 1,834.74 paid tons of tomatoes. Complainant stated that the production from the second planting was not as great as from the first, and was probably closer to the average production for Yolo county where the fields were located. Complainant rounded off the amount that it claimed should

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[7]Estimations of damages by an interested party have been accorded credibility in similar circumstances. See *Adolph O. Anderson v. Big Stone Canning Company*, 33 Agric. Dec. 961 (1974). See also *Farmers Sales, Inc. v. Tomatoes, Inc.*, 32 Agric. Dec. 1889 (1973).

[8]Complainant used 97 loads, which was the number harvested by Respondent before it ceased harvesting. Apparently Complainant forgot to include the 6 loads harvested from the first field by Complainant on the 27th after Respondent quit. The use of 97 loads from 55 acres yields approximately 2,168 tons, or 39.4 tons per acre at an average of 25 tons per load, which is the average used by Complainant.

have been produced from the second field down to 2,500 tons, and we will use this figure. The harvest from the second field should, therefore, have yielded an additional 665.26 tons. Using the net figure of $41.65 per ton the value of these additional tons would have been $27,708.08. We conclude that Respondent owes Complainant this amount for the tomatoes not harvested from the second field.

In addition to the above, Complainant asserted that Respondent overcharged for 726.29 tons of tomatoes which it harvested. The accounting reveals Respondent charged $13.00 per ton instead of the contracted $11.00 per ton. Complainant should be awarded the difference between these two amounts, or $1,425.28.

Complainant also claims for the harvest expenses it incurred in harvesting the tomatoes after Respondent ceased harvesting the tomatoes. Complainant detailed these expenses and provided supporting documentation. The expenses were as follows:

Harvest equipment	$16,905.00
Wages	9,390.00
Worker's compensation, FICA, unemployment ins. etc,	1,883.00
Compensation for Robert Faris, Sr.	1,500.00
	$29,678.00

Of course this amount is recoverable only to the extent that it exceeds the $11.00 per ton which it would have cost Complainant for the harvest under the contract. The accounting shows that 1,834.93 paid tons were harvested by Complainant. This should have cost $20,184.23 in harvest fees. Complainant is entitled to the difference between its harvest costs of $29,678.00 and this amount, or $9,493.77.

An additional item is deducted on Respondent's accounting that Complainant has complained of. This is the $1.00 per ton management fee in regard to the tomatoes harvested by Complainant, or $1,834.93. Respondent has not shown any justification for this charge, and we conclude that Complainant should be reimbursed for this amount.

The total which we have found due from Respondent to Complainant is $73,782.06. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[9] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation

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[9] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

award.[10] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $73,782.06, with interest thereon at the rate of 10% per annum from October 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[10]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).